United States Court of Appeals

for the Second Circuit

ADDENDUM

76-7259

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thomas J. Byrnes and Francis R. Santangelo,

Plaintiffs-Appellants,

-against-

Faulkner, Dawkins & Sullivan and
Singer & Mackie, Inc.,

Defendants-Appellees.

Faulkner, Dawkins & Sullivan,

Counterclaim-Defendants,
Appellants, Appellees,

-against-

Thomas J. Byrnes and Francis R. Santangelo,

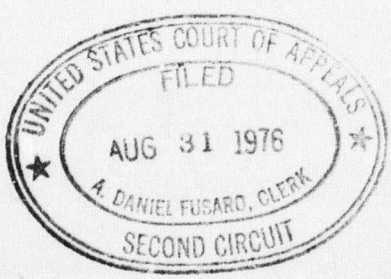
Counterclaim-Defendants,
Appellants, Appellees,

and

Tobey & Kirk,

Counterclaim-Defendant-Appellee.

ADDENDUM TO BRIEF FOR DEFENDANT-APPELLEE AND
CROSS-APPELLANT FAULKNER, DAWKINS & SULLIVAN



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RULES AND RELEASES

§ 352-c. Prohibited acts constituting misdemeanor

1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:

(a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;

(b) Any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances;

(c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made;

where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted.

2. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to engage in any artifice, agreement, device or scheme to obtain money, profit or property by any of the means prohibited by this section.

3. A person, partnership, corporation, company, trust or association, or any agent or employee thereof, using or employing any act or practice declared to be illegal and prohibited by this section, shall be guilty of a misdemeanor. Added L.1955, c. 553, § 2, eff. April 21, 1955.

§ 2—706. Seller's Resale Including Contract for Resale

(1) Under the conditions stated in Section 2—703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2—710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2—707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2—711). L.1962, c. 553, eff. Sept. 27, 1964.

§ 2—708. Seller's Damages for Non-acceptance or Repudiation

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2—723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2—710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2—710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. L.1962, c. 553, eff. Sept. 27, 1964.

§ 8—319. Statute of Frauds

A contract for the sale of securities is not enforceable by way of action or defense unless

(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price. L.1962, c. 553, eff. Sept. 27, 1964.

§ 77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of [1] such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

May 27, 1933, c. 38, Title I, § 4, 48 Stat. 77; June 6, 1934, c. 404, § 203, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 6, 68 Stat. 684; Aug. 20, 1964, Pub.L. 88-467, § 12, 78 Stat. 580.

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

May 27, 1933, c. 38, Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 7, 68 Stat. 684.

§ 77g. Information required in registration statement

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of section 77aa of this title, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B of section 77aa of this title; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

May 27, 1933, c. 38, Title I, § 7, 48 Stat. 78.

§ 77j. Information required in prospectus

(a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A of section 77aa of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of section 77aa of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

§ 77k. Civil liabilities on account of false registration statement

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

May 27, 1933, c. 38, Title I, § 12, 48 Stat. 84; Aug. 10, 1954, c. 667, Title I, § 9, 68 Stat. 686.

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

May 27, 1933, c. 38, Title I, § 13, 48 Stat. 84; June 6, 1934, c. 404, § 207, 48 Stat. 908.

§ 77s. Special powers of Commission

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter. Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of Title 49, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this subchapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

§ 78w. Rules and regulations; annual reports

(a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(b) The Commission and the Board of Governors of the Federal Reserve System, respectively, shall include in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this chapter. The Commission shall include in its annual reports to the Congress for the fiscal years ended on June 30 of 1965, 1966, and 1967 information, data, and recommendations specifically related to the operation of the amendments to this chapter made by the Securities Acts Amendments of 1964.

June 6, 1934, c. 404, § 23, 48 Stat. 901; Aug. 23, 1935, c. 614, § 203 (a), 49 Stat. 704; May 27, 1936, c. 462, § 8, 49 Stat. 1379; Aug. 20, 1964, Pub.L. 88–467, § 10, 78 Stat. 88a.

§ 78w. Rules, regulations, and orders; annual reports

(a)(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 78c(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

§ 78ff. Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78o of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

June 6, 1934, c. 404, § 32, 48 Stat. 904; May 27, 1936, c. 462, § 9, 49 Stat. 1380; June 25, 1938, c. 677, § 4, 52 Stat. 1076; Aug. 20, 1964, Pub.L. 88-467, § 11, 78 Stat. 580.

Employment of Manipulative and Deceptive Devices

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security.

[Adopted in Release No. 34-3230, May 21, 1942, 13 F. R. 8177.]

Prohibition Against Trading by Persons Interested in a Distribution

Reg. § 240.10b-6 is proposed to be amended. For text of the proposal, see subsection (f) below. CCH.

Reg. § 240.10b-6. (a) It shall constitute a "manipulative or deceptive device or contrivance" as used in Section 10(b) of the Act for any person,

(1) who is an underwriter or prospective underwriter in a particular distribution of securities, or

(2) who is the issuer or other person on whose behalf such a distribution is being made, or

(3) who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution,
directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right until after he has completed his participation in such distribution; *provided, however,* that this rule shall not prohibit (1) transactions in connection with the distribution effected otherwise than on a securities exchange with the issuer or other person or persons on whose behalf such distribution is being made or among underwriters, prospective underwriters or other persons who have agreed to participate or are participating in such distribution; (2) unsolicited privately negotiated purchases, each involving a substantial amount of such security, effected neither on a securities exchange nor from or through a broker or dealer; or (3) purchases by an issuer effected more than forty days after the commencement of the distribution for the purpose of satisfying a sinking fund or similar obligation to which it is subject; or (4) odd-lot transactions (and the off-setting round-lot transactions hereinafter referred to) by a person registered as an odd lot dealer in such security on a national securities exchange who offsets such odd-lot transactions in such security by round-lot transactions as promptly as possible; or (5) brokerage transactions not involving solicitation of the customer's order; or (6) offers to sell or the solicitation of offers to buy the securities being distributed (including securities or rights acquired in stabilizing) or securities or rights offered as principal by the person making such offer to sell or solicitation; or (7) the exercise of any right or conversion privilege to acquire any security; or (8) stabilizing transactions not in violation of § 240.10b-7; or (9) bids for or purchases of rights not in violation of § 240.10b-8; or (10) transactions effected on a national securities exchange in accordance with the provisions of a plan filed by such exchange under § 240.10b-2(d) and declared effective by the Commission; or (11) purchases or bids by an underwriter, prospective underwriter or dealer otherwise than on a securities exchange, 10 or more business days prior to the proposed commencement of such distribution (or 5 or more business days in the case of unsolicited purchases), if none of such purchases or bids are for the purpose of creating actual, or apparent, active

trading in or raising the price of such security. In the case of securities offered pursuant to an effective registration statement under the Securities Act of 1933 the distribution shall not be deemed to commence for purposes of this clause (11) prior to the effective date of the registration statement.

(b) The distribution of a security (1) which is immediately exchangeable for or convertible into another security, or (2) which entitles the holder thereof immediately to acquire another security, shall be deemed to include a distribution of such other security within the meaning of this rule.

(c) The following shall be applicable for the purposes of this rule:

(1) The term "underwriter" means a person who has agreed with an issuer or other person on whose behalf a distribution is to be made (A) to purchase securities for distribution or (B) to distribute securities for or on behalf of such issuer or other person or (C) to manage or supervise a distribution of securities for or on behalf of such issuer or other person.

(2) The term "prospective underwriter" means a person (A) who has agreed to submit or has submitted a bid to become an underwriter of securities as to which the issuer, or other person on whose behalf the distribution is to be made, has issued a public invitation for bids, or (B) who has reached an understanding, with the issuer or other person on whose behalf a distribution is to be made, that he will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.

(3) A person shall be deemed to have completed his participation in a particular distribution as follows: (A) the issuer or other person on whose behalf such distribution is being made, when such distribution is completed; (B) an underwriter, when he has distributed his participation, including all other securities of the same class acquired in connection with the distribution, and any stabilization arrangements and trading restrictions with respect to such distribution to which he is a party have been terminated; (C) any other person, when he has distributed his participation. A person, including an underwriter or dealer, shall be deemed for purposes of this paragraph (c)(3) to have distributed securities acquired by him for investment.

(d) The provisions of this rule shall not apply to any of the following securities: (1) "exempted securities" as defined in Section 3(a)(12) of the Act, including securities issued, or guaranteed both as to principal and interest, by the International Bank for Reconstruction and Development; or (2) face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management company or a unit investment trust. Any terms used in clause (2) of this paragraph (d) which are defined in the Investment Company Act of 1940 shall have the meanings specified in such Act.

(e) The provisions of this rule shall not apply to any distribution of securities by an issuer to its employees, or to employees of its subsidiaries, or to a trustee or other person acquiring such securities for the account of such employees, pursuant to (1) a stock option plan involving only "qualified stock options", or qualifying as an "employee stock purchase plan" as those terms are defined in Sections 422 and 423 of the Internal Revenue Code of 1954, as amended or "restricted stock options" as defined in Section 424(b) of the Internal Revenue Code of 1954, as amended, provided however, that for the purposes of this paragraph an option which meets all of the conditions of that Section other than the date of issuance shall be deemed to be "restricted stock options" or (2) a savings, investment or stock purchase plan providing for both (A) periodic payments (or payroll deductions) for acquisition of se-

curities by participating employees and (B) periodic purchases of the securities by participating employees, or the person acquiring them for the account of such employees.

(f) This rule shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms and conditions, as not constituting a manipulative or deceptive device or contrivance comprehended within the purpose of this rule.

[Adopted in Release No. 34-5194, August 15, 1955, 20 F. R. 5075; amended by Release No. 34-5208, August 24, 1958, 20 F. R. 6154; Release No. 34-7403, September 9, 1964, 29 F. R. 12693; and by Releases No. 33-4733 and No. 34-7467 (¶ 77,155), effective November 20, 1964, 29 F. R. 16856.]

[Availability of "Broker's Exemption" to Customer of Broker]

This release refers to the Act as in effect prior to the 1964 amendments. CCH.

Release No. 33-131, March 13, 1934, 11 F. R. 10946.

17 CFR 231.131. Extract from letter of Federal Trade Commission discussing the availability of a "broker's exemption" to the customer of the broker. The Federal Trade Commission today made public an extract from a letter in response to an inquiry concerning the application of Section 4 (2) of the Securities Act. This release supplements Release No. 97 (17 CFR 231.97), published December 28, 1933 [¶ 1021—1029], containing extracts from other letters discussing the application of the act to various situations.

16. Section 4 (2). Certain corporations having unissued stock and others having treasury stock which was originally issued before the effective date of the Securities Act proposed to sell such stock through brokers on the stock exchange. The question was raised whether Section 4 (2) of the Securities Act made it unnecessary for the issuing corporations to register such stock before ordering its sale. The following is the comment contained in the letter:

Apparently the exemption provided by Section 4 (2) of the Securities Act applies only to the broker's part of a broker's transaction. It does not extend to the customer. Whether the customer is excused from complying with the requirements of Section 5 depends upon his own status or upon the character of the transaction in which he, himself is engaged. In other words, therefore, an issuer selling through a broker on the stock exchange would be subject to Section 5 of the Act. This would be true whether the securities sold by the issuer were unissued or treasury stock.

The House Report on the Securities Act (H. R. No. 85, 73rd Congress, 1st Session), at page 16, contains comment on this section of the Act which involves the interpretation which I have outlined above. Under this exemption, it is stated, "Purchasers, provided they are not dealers, may thus in the event that a stop order has been entered, cut their losses immediately, if there are losses, by disposing of the securities. On the other hand, the entry of a stop order prevents any further distribution of the security." This statement indicates that dealers (in the period of one year after date of public

offering) would be unable to sell through brokers, securities for which no registration statement was in effect in accordance with the provisions of Section 5 (a). The same restriction must, of course, apply to issuers and underwriters. Obviously, the committee did not conceive that the exemption extended to the broker's customer.

[Treasury Stock]

Under this ruling, treasury stock, originally issued before the effective date of the Securities Act of 1933, must be registered under that act before it may be sold.

[Release No. 33-131, March 13, 1934, 11 F. R. 10946.]

[Issuance of Prospectuses to Customers in Connection with Trading in Registered Securities]

Release No. 33-2625, July 25, 1941, 11 F. R. 10964.

17 CFR 231.2623. Opinion of General Counsel concerning the application of the third clause of section 4(1) in various situations.

I have been asked to express my opinion as to the circumstances under which brokers and dealers must use prospectuses in connection with trading in the securities of American Telephone and Telegraph Company covered by the registration statement which became effective under the Securities Act on July 15, 1941.

[Nature of the Offering]

In order to make my discussion more clearly understandable in its application to the various concrete situations which may arise, I shall first describe briefly the nature of the offering in question. The registration statement covered $233,584,900 in principal amount of debentures of the Company, proposed to be offered by the Company pro rata to its existing stockholders, without the intermediation of any underwriters. The statement covered also full and fractional warrants which the Company proposed to deliver to its stockholders in evidence of their right to purchase debentures from the Company. These warrants were to be issued to all stockholders of record at the close of business on July 25, 1941, and the registration statement specified that the warrants would actually be issued to stockholders on or about August 4, 1941. The warrants by their terms were required to be exercised on or before August 29, 1941. Pursuant to an order of the Commission entered on July 11, 1941, the registration statement became effective at 4:45 P. M., E. S. T., on July 15, 1941. So far as practicable, prospectuses were made generally available by the Company on July 16, 1941.

[Use of Mails or Instrumentalities of Interstate Commerce]

Before discussing the legal requirements which have been applicable since the registration statement became effective, I should like to point out that until the statement became effective it was illegal for any broker or dealer to use the mails or instrumentalities of interstate commerce to offer or sell either the debentures or the warrants on a when-issued basis. This was clearly stated in a release published by the Commission on July 9, 1941 (Securities Act Release No. 2613). Apparently, it was not sufficiently understood that the prohibition of the statute extended not only to offers and sales for immediate execution, but also to solicitations of orders which were not to be given and executed until after the effective date of the statement. Thus, a circular distributed by a broker or dealer to his customers, describing the debentures and the rights and suggesting that he would be glad to receive and execute orders after the statement became effective, was no less a violation of the statute than a circular inviting the immediate submission of orders before the effective date. The same would be true even if the circular carried a "hedge clause" specifically disclaiming any intent to solicit orders. If the

circular in fact constituted a solicitation of orders it could not be brought within the law by mere formal disclaimers.

Now that the statement has become effective, there is no prohibition against offering rights or debentures, or soliciting orders to buy them, whether on a when-issued or an issued basis. However, the Act requires that if any prospectus relating to a registered security is transmitted through the mails or in interstate commerce, that prospectus must be in the form of, or accompanied or preceded by the formal prospectus filed by the issuer with its registration statement. (For convenience, I shall call this prospectus a "formal prospectus." In the Act it is referred to as a "prospectus that meets the requirements of section 10.") Furthermore, even if in a particular sale no use is made of the mails or interstate commerce to offer the security, or to solicit orders to buy it, the security itself must still be accompanied or preceded by the formal prospectus when the security is delivered through the mails or in interstate commerce.

[Scope of Term "Prospectus"]

In applying these principles to particular situations, brokers and dealers should appreciate that the term "prospectus" as used in the Securities Act covers more than the kind of formal document which the layman ordinarily has in mind when he uses the term. Under the Act a "prospectus" includes every kind of written communication which attempts or offers to dispose of, or solicits an offer to buy, a security for value, or which constitutes a contract of sale or disposition of a security for value. If the term "prospectus" is construed in accordance with its language and spirit, it must in my opinion be read to cover any document which is designed to procure orders for a security, or to effectuate the disposition of a security, whether or not the document purports on its face to offer the security for sale, or otherwise to dispose of it for value.

[Concrete Examples]

In the light of these general principles let me discuss concrete examples which will illustrate in greater detail the application of the prospectus requirements of the Act to transactions occurring after the effective date of the registration statement.

Question 1. John Doe, a dealer, writes a letter to Richard Roe, one of his customers, offering him warrants, on a when-issued basis, for ten $100 debentures. Must John Doe send a copy of the formal prospectus with his letter?

Answer. Yes. John Doe's letter itself falls within the broad definition of "prospectus" in the Act. As such, it must, in order to comply with the Act, either be in the form of the formal prospectus—which it obviously is not—or else be preceded or accompanied by a formal prospectus.

Question 2. Instead of writing a letter to Richard Roe, John Doe calls him on the telephone and offers him the warrants. Richard Roe accepts; and John Doe thereupon mails him a confirmation of the sale. Must John Doe send a copy of the formal prospectus with his confirmation?

Answer. Yes. The term "prospectus" is defined in the Act broadly to include within its meaning an ordinary confirmation; and since the confirmation is not itself a formal prospectus, it, like the offering letter in Question 1, must be accompanied or preceded by a formal prospectus.

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Question 3.[1] John Doe happens to know that his customer, Richard Roe, is already a stockholder of American Telephone and Telegraph Company, and has therefore already received a prospectus from the Company itself. Must John Doe still, in the situation described in Questions 1 and 2, send Richard Roe a formal prospectus?

Answer.[1] Yes. In requiring that a letter offering registered securities, or a confirmation, must be accompanied or preceded by a formal prospectus, the Act requires further that this formal prospectus shall have been sent or given —not by *anyone*, but by the person who sent the letter or confirmation, or by his principal. John Doe is not acting for American Telephone and Telegraph Company. Consequently, the fact that Richard Roe has received a prospectus from American Telephone and Telegraph Company does not affect the responsibility that John Doe has to comply with the prospectus requirements.

Question 4. On August 5, 1941, John Doe telephones Richard Roe, his customer, and states that he has warrants for ten $100 debentures, and will be glad to sell them to Richard Roe. Richard Roe accepts the offer. John Doe thereupon immediately puts the warrants in an envelope, and mails them to Richard Roe. Must John Doe enclose also a copy of the formal prospectus?

Answer. Yes. The Act requires that registered securities, when delivered through the mails or in interstate commerce, shall be preceded or accompanied by a formal prospectus; and since John Doe made an oral offer, without sending a formal prospectus, he must send one with the warrants.

Question 5. In the course of the conversation described in Question 4, Richard Roe mentions that he is already a stockholder of American Telephone and Telegraph Company, and so has received a copy of the prospectus. Must John Doe nevertheless send him another copy?

Answer. No. In requiring that securities, when delivered, be accompanied or preceded by a prospectus, the Act does not require that the prospectus shall have been sent or given by the person making the delivery. It is enough that the purchaser shall already have received a prospectus from some source. (Owing to the particular wording of the Act, this situation must be carefully distinguished from the case in Question 3.)

Question 6. John Doe, a broker, receives an unsolicited telephone call from Richard Roe, asking him to purchase for Richard Roe's account warrants for ten $100 debentures. John Doe does so and sends them to Richard Roe by mail. Must he send a copy of the prospectus with the warrants?

Answer. No. The prospectus requirements of the Act do not apply to unsolicited brokers' transactions, whether executed on an exchange or over the counter.

Question 7. Richard Roe telephones John Doe, his broker, and states that he has certain warrants which he would like John Doe to sell for his account. John Doe does so, and sends him a confirmation of the transaction. Must John Doe at the same time send him a copy of the prospectus?

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[1] Question and answer No. 3 of Release No. 33-2623 are considered to be inoperative because of the 1954 amendment of Section 2(10) [¶ 1451]. CCH.

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Answer. No. In confirming a sell order on a brokerage basis, John Doe is not within the prospectus requirements of the Act.

Question 8.[2] Pursuant to the sell order received in Question 7, John Doe sells Richard Roe's warrants to Henry Hoe, another dealer, who purchases for his own account. Must John Doe, in confirming the sale to Henry Hoe, or in delivering the warrants to him, send him a copy of the prospectus?

Answer.[2] No. John Doe, in making the sale, is completing the execution of an unsolicited brokerage order, and therefore is exempt from the prospectus requirements.

Question 9. John Doe writes to his customer Richard Roe, whom he knows to be a stockholder of American Telephone and Telegraph Company and offers to sell for him the warrants he has received. Must John Doe send Richard Roe a formal prospectus with his letter?

Answer. No, since he is offering to sell *for* him, not *to* him.

Question 10.[2] As a result of the letter described in Question 9, Richard Roe gives John Doe a sell order, and John Doe sells the rights to Henry Hoe. When he mails the warrants to Henry Hoe, must he send a copy of the prospectus with them?

Answer.[2] Yes. The transaction, although on a brokerage basis, results from a solicitation, and consequently the prospectus requirements are applicable to John Doe's sale to Henry Hoe.

Question 11. John Doe writes a letter to Richard Roe, his customer, offering to purchase rights for his account. Must John Doe enclose in his letter a copy of the prospectus?

Answer. Yes. Even though John Doe acts as broker in the transaction, he is soliciting an offer to buy, and is therefore subject to the prospectus requirements of the Act.

In an effort to be of the greatest assistance to brokers and dealers in the practical conduct of their business, I have endeavored to state the foregoing illustrative questions and answers in as non-technical a fashion as possible. Anyone desiring more detailed information as to the statutory basis for the answers I have given, or wishing information as to any situations which I have not covered, is welcome to address a further inquiry to this office.

[Release No. 33-2623, July 25, 1941, 11 F. R. 10964.]

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[2] Questions and answers No. 8 and 10 of Release No. 33-2623 were superseded by Reg. § 230.154, now rescinded. See ¶ 2985.14. CCH.

17 CFR 231.2623

For IMMEDIATE Release Thursday, August 2, 1951

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

SECURITIES ACT OF 1933
Release No. 3421

The Securities and Exchange Commission today adopted a new rule, designated as Rule 154 under the Securities Act of 1933, which defines the term "solicitation" in connection with the exemption for unsolicited brokerage transactions in Section 4 (2) of the Act.

Section 4 (2) exempts from the registration and prospectus requirements of the Act:

> "Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders."

The interpretation of Section 4 (2) has been the subject of considerable doubt. The purpose of the new rule is to settle some interpretative questions relating to the meaning of the word "solicitation" in that section.

Paragraph (a) of the rule provides that the term "solicitation of such orders" shall be deemed to include "the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security." For reasons set forth by the Commission in Brooklyn Manhattan Transit Corporation, 1 SEC 147, 171-2 (1935), if the broker solicits the purchaser to buy the security, Section 4 (2) does not provide an exemption either for the solicitation itself or for the resulting transaction. On the other hand, if the broker does not solicit the purchaser to buy, the mere fact that he may solicit the seller to sell will not destroy any exemption otherwise available to him under Section 4 (2); this construction is based on the fact that the statute is designed primarily for the protection of buyers rather than for the protection of sellers.

While paragraph (a) of the rule makes it clear that there is no exemption for the solicitation of orders to buy, a question remains as to what constitutes "solicitation" where a broker for a seller approaches a dealer who is bidding for the security or soliciting others to sell it to him. Paragraph (b) of the rule provides that, where the dealer's bid or solicitation is in writing, the broker's inquiry about it is not a "solicitation" within the meaning of Section 4 (2), so that it does not destroy any exemption otherwise available. Paragraph (b) recognizes also that, in the over-the-counter market, dealers interested in buying a particular security may not publish a quotation or indication of interest on it every day or every week. To some extent such quotations are published in monthly services, and to allow for the delays incident to such publications the rule provides, in effect, that the broker can rely on bids or indications of buying interest originating as much as 60 days previously as indicating that a dealer is soliciting sell orders, so that the broker, in calling the dealer, would not be deemed to be soliciting him.

Rule 154 is a definition for purposes of Section 4 (2) and is not intended to serve, for example, as a definition of the phrase "solicitation of an offer to buy" which appears in Section 2 (3) of the Act. Nor is it intended to affect the Commission's holding in Ira Haupt & Co., Securities Exchange Act Release No. 3845 (1946), regarding the applicability of Section 4 (2) to transactions by

underwriters. The rule supersedes those portions of Securities Act Release No. 2623 (11 F. R. 10964, 10965) designated as questions and answers 8 and 10.

The text of the Commission's action follows:

The Securities and Exchange Commission, acting pursuant to authority conferred upon it by the Securities Act of 1933, particularly sections 4 (2) and 19 (a) thereof, and deeming such action necessary to carry out the provisions of that Act, hereby adopts Rule 154. Since the rule is an interpretative rule, the Commission finds that the preliminary notice and public procedure provided for in Section 4 (a) and (b) of the Administrative Procedure Act are unnecessary and declares the rule effective immediately pursuant to Section 4 (c) of that Act.

The text of the rule follows:

"Rule 154. Definition of 'Solicitation of Such Orders' in Section 4 (2) for Certain Purposes.

"(a) The term 'solicitation of such orders' in section 4 (2) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security.

"(b) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of offers to sell such security, the term 'solicitation' in section 4 (2) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation."

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For IMMEDIATE Release Wednesday, December 22, 1954

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

SECURITIES ACT OF 1933
Release No. 3525

AMENDMENT OF RULE 154

The Commission today adopted an amendment of Rule 154 in the form set forth below. The amendment defines the term "brokers' transactions" as used in Section 4(2) of the Securities Act of 1933 which exempts from the registration and prospectus requirements of the Act —

> "Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders."

Purpose of Amendment

As a result of the Commission's decision in the Ira Haupt & Company case (23 SEC 589 (1946)), doubt has arisen as to the scope of the exemption provided by Section 4(2) for brokers' transactions effected on behalf of controlling persons.

Rule 154 as originally promulgated in Release No. 3421 (August 2, 1951) defined certain terms used in Section 4(2) of the Act but did not attempt to define the term "brokers' transactions". In connection with the study last year of recommendations for amendment of the various acts administered by the Commission (See. H. Rept. 2508, 82d Cong., 2d Sess., S. Rept. 1036, 83rd Cong., 2d Sess., H.Rept. 1542, 83rd Cong., 2d Sess.), proposals were received from various groups for amendment of Section 4(2) "so as to give relief from the popular interpretation" of the Haupt opinion. Neither the bill (S. 2846, 83rd Cong., 2d Sess.) reported to the Senate by the Banking and Currency Committee of the Senate and to the House of Representatives by the Interstate and Foreign Commerce Committee of the House nor as enacted (P. L. 577, 83rd Cong., 2d Sess.) contained any amendment of Section 4(2). However, the Report of the Banking and Currency Committee stated: "Your committee is hopeful that the SEC will give favorable consideration to a rule which will deal effectively with the problem and understands that the SEC has such a rule under consideration." (Senate Report No. 1036, 83rd Cong., 2d Sess. (1954) at 7.)

The Commission, thereafter, in Release No. 3501 (May 3, 1954) announced a proposed amendment of Rule 154, defining certain terms for the purposes of Section 4(2) of the Act. The proposed amendment of Rule 154 which was circulated for comment on May 3, 1954, would have added to Rule 154 a definition of the term 'brokers' transactions" appearing in Section 4(2). This proposal was designed to resolve the doubts of underwriters, dealers and brokers and to make clear that the availability of an exemption under Section 4(2) does not turn solely upon the question whether the selling stockholder is a controlling person but involves also a determination whether such controlling person, to the actual or constructive knowledge of the broker, is effecting a distribution of his holdings.

The Commission received numerous written comments and suggestions. After appropriate notice a public hearing was held on July 6, 1954, at which interested persons were afforded an opportunity to present their views orally. After careful consideration of the views, suggestions and comments submitted in writing and at the hearing, the Commission published for comment on September 13, 1954, in Release No. 3515, a revised proposal for amendment of Rule 154. The revised proposal, among other things, suggested certain percentage tests as ready guides for routine trading transactions. The Commission received additional comments, the substance of certain of which has been incorporated in the amended Rule 154 as set forth below.

The proposed amendment defines the term "brokers' transactions" as used in Section 4(2) to include transactions of sale executed by a broker for the account of any person controlling, controlled by, or under common control with the issuer where the broker performs no more than the usual and customary broker's function; receives no more than the usual and customary commission; neither he nor, to his knowledge, his principal solicits orders to buy; and he is not aware of circumstances indicating that his principal is an underwriter or engaged in a distribution of securities. For the purposes of this rule, the term "distribution" is defined as not applying to transactions which involve amounts not substantial in relation to the outstanding securities of the same class and the aggregate volume of trading in the security.

To provide a ready guide for routine cases involving trading as distinguished from distributing transactions, the term "distribution" is further defined as not including a sale or series of sales of securities which, together with all other sales of securities of the same class by or on behalf of the same person within the preceding 6 months will not exceed approximately 1% of the outstanding shares or units of the security in the case of a security which is traded only otherwise than on a securities exchange and, with respect to a security which is admitted to trading on a securities exchange, the lesser of either 1% of the outstanding securities of the class or the aggregate reported volume of trading during any one week within the preceding 4 calendar weeks. It should be emphasized that some cases which do not fall within the scope of the specific formulas so provided may nevertheless, under the circumstances of a particular case, be "brokers' transactions" for which the exemption under Section 4(2) would be available. In such cases brokers and their counsel may rely upon the general definition of "distribution".

In view of the significant problems in the area encompassed by the amended rule, the Commission intends to study closely its operation in order to make certain that its effects will be consistent with the purposes of the Act.

Statutory Basis

This action is taken pursuant to the Securities Act of 1933, particularly Sections 4(2) and 19(a) thereof, the Commission deeming such action necessary to carry out the provisions of the Act.

Text of Amendment

Rule 154 is amended to read as follows:

RULE 154. DEFINITION OF CERTAIN TERMS USED IN SECTION 4(2).

(a) The term "brokers' transactions" in Section 4(2) of the Act shall be deemed to include transactions by a broker acting as agent for the account of any person controlling, controlled by, or under common control with, the issuer of the securities which are the subject of the transactions where—

(1) the broker performs no more than the usual and customary broker's function,

(2) the broker does no more than execute an order or orders to sell as a broker and receives no more than the usual or customary broker's commission, and the broker's principal, to the knowledge of the broker, makes no payment in connection with the execution of such transactions to any other person,

(3) neither the broker, nor to his knowledge his principal, solicits or arranges for the solicitation of orders to buy in anticipation of or in connection with such transactions, and

(4) the broker is not aware of circumstances indicating that his principal is an underwriter in respect of the securities or that the transactions are part of a distribution of securities on behalf of his principal.

(b) For the purpose of paragraph (a) of this Rule, the term "distribution" shall not apply to transactions involving an amount not substantial in relation to the number of shares or units of the security outstanding and the aggregate volume of trading in such security. Without limiting the generality of the foregoing the term "distribution" shall not be deemed to include a sale or series of sales of securities which, together with all other sales of securities of the same class by or on behalf of the same person within the preceding period of six months, will not exceed the following: (1) if the security is traded only otherwise than on a securities exchange, approximately one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (2) if the security is admitted to trading on a securities exchange the lesser of approximately (A) one percent of the shares or units of such security outstanding at the time of receipt by the broker of the order to execute such transactions or (B) the largest aggregate reported volume of trading on securities exchanges during any one week within the four calendar weeks preceding the receipt of such order.

(c) The term "solicitation of such orders" in Section 4(2) of the Act shall be deemed to include the solicitation of an order to buy a security, but shall not be deemed to include the solicitation of an order to sell a security.

(d) Where within the previous 60 days a dealer has made a written bid for a security or a written solicitation of an offer to sell such security, the term "solicitation" in Section 4(2) shall not be deemed to include an inquiry regarding the dealer's bid or solicitation.

* * * *

Effective Date

The foregoing amended rule shall become effective immediately upon publication.

By the Commission.

Orval L. DuBois
Secretary

Disclosure on Confirmations

Sec. 12. A member at or before the completion of each transaction with a customer shall give or send to such customer written notification disclosing (1) whether such member is acting as a broker for such customer, as a dealer for his own account, as a broker for some other person, or as a broker for both such customer and some other person; and (2) in any case in which such member is acting as a broker for such customer or for both such customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the fact that such information will be furnished upon the request of such customer, and the source and amount of any commission or other remuneration received or to be received by such member in connection with the transaction.

Emergency Rule of Fair Practice No. 70-2

I. In all cases where a member has a "fail to deliver" or a "fail to receive" on its books which is not cleared by it within thirty days after it reaches 60 days in age (120 days in the case of foreign securities except American Depository Receipts and Canadian securities), such shall constitute a violation of Article III, Section 1 of the Rules of Fair Practice and of this emergency rule.

[Section I amended effective November 1, 1971.]

II. For good cause shown and in exceptional circumstances, in situations where it can be demonstrated that

(1) the member has taken all necessary and reasonable steps to process the clearance of transactions and delay has not been occasioned on his account, where application of the rule would work hardship upon public customers and/or the member, and

(2) where the failure to meet the standards set forth above results from an occasional transaction and its peculiar nature such as a dispute arising from a legal transfer,

a member may request exemption from the provisions of Section 1 hereof by written request to the District Director of his District in which his principal office is located who shall have the authority to grant exceptions when the above criteria have been met.

III. This rule has been promulgated as an emergency rule of fair practice pursuant to the provisions of Article VII of the By-Laws of the Corporation, an emergency having been found to exist by resolution of the Board of Governors of the Corporation dated September 22, 1969.*

Sec. 1.

(a) All over-the-counter transactions in securities between members, except transactions in securities between members which are compared, cleared or settled through the facilities of the National Clearing Corporation and which shall be subject to the rules of the National Clearing Corporation and except transactions in securities exempted under Section 3(a)(12) of the Securities Exchange Act of 1934, shall be subject to the provisions of this Code.

(b) In trades between members, failure to deliver the securities sold, or failure to pay for securities as delivered, on or after the settlement date, does not effect a cancellation of the contract. The remedy for the buyer or seller is provided for by Sections 59 and 60 respectively unless the parties mutually consent to cancel the trade.

[Section 1 amended effective January 1, 1973.]

Sec. 10. Confirmations or comparisons shall include, in addition to an adequate description of the security and the price at which the transaction was made, any other information deemed necessary to insure that the buyer and seller agree as to details of the transaction. Such "other information" should include, if applicable, but need not be limited to such phrases as "ex-warrants," "ex-stock," "registered," "flat," "part-redeemed," "Canadian funds," "with proxy," etc.

"DK" Procedures

(c) When a party to a transaction sends a confirmation or comparison of a trade, but does not receive a confirmation or comparison, or a signed DK, from the contra-broker by the close of four business days following the trade date of the transaction, the following procedure may be utilized:

(1) Not later than the fifteenth calendar day following the trade date the confirming member shall send by certified mail, return receipt requested, or messenger, a "Don't Know Notice" on the form prescribed by the Association to the contra-broker in accordance with the directions contained thereon. If the notice is sent by certified mail the returned, signed receipt therefor must be retained by the confirming member and attached to the fourth copy of the "Don't Know Notice". If delivered by messenger, the fourth copy must immediately be dated and manually receipted by, and imprinted with the firm stamp of, the contra-broker pursuant to the provisions of paragraph (4) hereof, returned to the messenger and thereafter be retained by the confirming member.

(2) (a) After receipt of the "Don't Know Notice" as specified in section (1) hereof, the contra-broker shall have four business days after the notice is received to either confirm or DK the transaction by mail or messenger in accordance with the provisions of subparagraphs (b) or (c) and subsection (4) hereof.

(b) If the contra-broker desires to respond by mail, the second copy of the "Don't Know Notice" previously received shall be executed in accordance with the provisions of subsection (4) hereof and sent to the confirming broker by certified mail, return receipt requested. The notice so returned shall indicate clearly whether the contra-broker desires to confirm or DK the transaction. The returned, signed receipt must thereafter be retained by the contra-broker.

(c) If the contra-broker desires to respond by messenger, he shall return to the confirming broker the second and third copies of the notice which shall indicate clearly whether the contra-broker desires to confirm or DK the transaction. The third copy shall be dated and manually receipted by the confirming broker pursuant to the provisions of subsection (4) hereof and immediately be returned to the messenger and thereafter be retained by the contra-broker.

(3) If the confirming member does not receive a response from the contra-broker by the close of four business days after receipt by the confirming member of either the fourth copy of the "Don't Know Notice" as specified in subsection (1) if delivered by messenger, or the post office receipt if delivered by mail, such shall constitute a DK and the confirming member shall have no further liability.

(4) All "Don't Know Notices" sent by any party pursuant to the provisions of this section 9(b) must be manually signed by a person authorized to pursue further discussions in respect to the transaction on behalf of the signing member. In addition to the manual signature receipt on the third and fourth copies, as required by paragraphs (b)(1) and (b)(2)(c) hereof, if delivered by hand, the firm stamp of the contra-broker must be imprinted thereon to signify receipt.

(5) The "Don't Know Notice" form to be used for purposes of complying with this section, may be ordered through any office of the Association. If the official form is not used, the form which is used must conform in every respect to the official form.

[Section 9 amended effective February 9, 1968; amended effective December 30, 1968; March 1, 1970; December 1, 1972.]

By Stephen Grossman

2 Copies Rec'd 8/31/76
Hall, Dickler, Lawler, Kent & Howley

2 COPY RECEIVED
CARRO, SPANBOCK & LONDIN
AUG 31 1976
A.M. P.M.
ATTORNEYS FOR
BY